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In the

Supreme Court of the United States

OCTOBER TERM, 1962

No. 433

CITY TRANSPORTATION COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

W. D. WHITE,
JAMES L. TRUITT,
TURNER, WHITE, ATWOOD,
MEER & FRANCIS,
1900 Mercantile Dallas Building,
Dallas 1, Texas,
Attorneys for Petitioner.

GEORGE E. SEAY,
Dallas Federal Savings Building,
Dallas 1, Texas,
Of Counsel.

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

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---

City Transportation Company, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above titled cause on May 17, 1962.

OPINIONS BELOW

The decision and order of the National Labor Relations Board (R. 84, Appendix A) is reported at 131 N.L.R.B. No. 105. The opinion of the Court of Appeals for the Fifth Circuit (R. 621, Appendix B) is unreported in the official reports.

JURISDICTION

The judgment of the Court of Appeals was entered on May 17, 1962. Petition for Rehearing (R. 625) was denied on June 16, 1962 (R. 636, Appendix C), and a decree ordering enforcement of the order entered by the National Labor Relations Board against the Petitioner was entered by the Court of Appeals on July 13, 1962 (R. 637, Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the National Labor Relations Board and its Hearing Examiner committed error in making findings of fact with respect to the jurisdictional issue by relying solely on the satisfaction of quantitative criteria used by the Board in determining whether to accept or decline jurisdiction rather than on the qualitative standard (that the alleged unfair labor dispute is one "affecting commerce") prescribed by 29 U.S.C. § 160(a).

STATUTES INVOLVED

The pertinent statutory provision is 29 U.S.C. § 160(a), which is quoted in Appendix E.

STATEMENT

Seven charges were filed before the regional office for the Sixteenth Region of the National Labor Relations Board on June 27, 1960, against City Transportation Company, a taxicab company, doing business in Dallas, Texas, alleging

unfair labor practices consisting of the discriminatory discharging of employees and the surveillance of a union organization meeting (R. 13-36). On August 9, 1960, the seven charges were consolidated into one cause and a consolidated complaint and notice of hearing was issued by the Regional Director of the National Labor Relations Board.

City Transportation Company made a timely plea to the jurisdiction of the Board (R. 41). After hearings before a Hearing Examiner of the N.L.R.B., an Intermediate Report and Recommended Decision (R. 50) containing findings of fact and conclusions of law unfavorable to City Transportation Company both on the jurisdictional issue and on the substantive issue as to the occurrence of unfair labor practices was entered by the Hearing Examiner.

The Hearing Examiner's finding on the jurisdictional issue was based on the stipulation by the parties (R. 50, also note 1 to the opinion of the Court of Appeals in the instant case, Appendix B) that:

> "(1) Gross volume of business for the preceding year exceeded $2,500,000 for operating 380 cabs and 34 limousines.
>
> "(2) During the same period Respondent purchased:
>
> "(a) $200,000 of replacement taxicabs from local automobile dealers;
>
> "(b) Automobile parts of $25,000 from a local distributor who in turn had received same from outside the State of Texas.
>
> "(3) The limousines were used in parades, funerals and special occasions or hired by individuals, but pri-

marily were operated for the purpose of transporting passengers between Dallas Love Field Airport and the downtown area, and the gross revenue from limousines during the preceding year exceeded $100,000.

"(4) Love Field is a municipal airport out of which American, Braniff and Delta operate airplanes which transport passengers to and from Love Field and points outside Texas as well as to all points with the State of Texas having regular scheduled passenger service."

The Hearing Examiner concluded that by stipulating that it had a gross volume of business exceeding $2,500,000 for the year, Petitioner had foreclosed the jurisdictional issue because of the existence of internal jurisdictional standards promulgated by the Board which provided that the Board would assume jurisdiction of disputes involving retail enterprising (including taxicab companies) having a gross volume of business in excess of $500,000 per annum, see 294 F. 2d 255 for a comprehensive statement of the jurisdictional standards applied by the Board in the instant case, with a listing of the Board decisions in which each standard was promulgated. The Hearing Examiner stated his position quite explicitly in the hearing (R. 266):

"In the case of *Carolina Supplies and Cement Company*, 122 N.L.R.B. 88, the Board decided that it would assert jurisdiction over all retail enterprises deemed to include taxicab companies which shall fall within its jurisdiction and which do a gross volume of business of at least $500,000 per annum. The Board also in that case decided that jurisdiction would rest upon the gross volume of business *alone* as indicative of its jurisdiction. (Emphasis supplied.)

> "There is a reaffirmation of that document in the recent case of *Jal Transportation Corp.*, 128 N.L.R.B. 95, which was decided in August of 1960.
>
> "Since the pleadings indicate that Respondent has admitted that it does a gross volume of business of $500,000, or in excess thereof, Respondent's motion to the plea of jurisdiction is denied."

The finding of "fact" on the jurisdiction issue made by the Hearing Examiner in his Intermediate Report and Recommended Order was (R. 63):

> "The activities of Respondent in violation of Section 8(a)(1) of the Act, set forth above, occurring in connection with the operations of Respondent described in Section I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce."

The Board made no additional findings on the jurisdictional issue, but merely sustained the conclusions of the Hearing Examiner. The Court of Appeals for the Fifth Circuit, like the Hearing Examiner, found that the stipulations agreed to by the Petitioner were determinative of the jurisdictional issue. Unlike the Hearing Examiner, however, the Court of Appeals did not rest its opinion solely on the admissions as to the volume of its business made by the Petitioner. Rather, on the basis of two cases involving city-wide bus transportation systems, *N.L.R.B. v. Fort Worth Transit Co., 187 F. 2d 792 (5th Cir. 1951)*, and *N.L.R.B. v. El Paso-Yselta Bus Line, Inc., 190 F. 2d 261 (5th Cir. 1951)*, it held that the record, *i.e.*, the stipulations, showed that as a matter of law the jurisdictional requirements were satisfied.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals, in supporting the proceedings before the National Labor Relations Board, is in clear conflict with the precept announced by this Court in *Consolidated Edison Co. v. N.L.R.B., 305 U. S. 197, 222 (1938)*:

> "(W)hether or not particular action in the conduct of intrastate enterprises does effect that commerce in such a close and intimate fashion as to be subject to federal control, is left to be determined as individual cases arise."

In the *Consolidated Edison* case, the employer involved was a massive enterprise which supplied 95.7% of the total electricity sold in New York City and 100% of that sold in Westchester County, New York. It had 42,000 employees with a total annual payroll amounting nearly to $82,000,000. Despite the tremendous size of the employer, the Court was constrained to demonstrate the manner in which the alleged unfair labor practices there involved might affect interstate commerce. By the same token, in the instant case, it was necessary that the Board support its assertion of jurisdiction by the showing of an effect on interstate commerce and not merely by reference to the volume of intrastate business conducted by the Petitioner. The error committed by the Board in the present case is precisely that which was warned of in the quoted passage from the *Consolidated Edison* decision, *i.e.*, the determination of federal jurisdiction on the basis of interstate commerce solely by reference to an arbitrary standard bearing no relation to the existence of an effect on commerce in the particular situation presented.

The principle of the *Consolidated Edison* decision is supported by the concurring opinion of Justice Black in *Polish National Alliance v. National Labor Relations Board, 322 U. S. 643, 652 (1944)*:

> "The doctrine that Congress may provide for regulations of activities not themselves interstate commerce, but merely 'affecting' such commerce, rests on the premise that in certain fact situations the Federal government may find that regulation of purely local and intrastate commerce is 'necessary and proper' to prevent injury to interstate commerce. *Houston, E. & W. T. Ry. Co. v. United States*, 234 U. S. 342; *Second Employers' Liability Cases*, 223 U. S. 1, 46-47; and see *Wickard v. Filburn*, 317 U. S. 111, 121. In applying this doctrine to particular situations this court properly has been cautious, and has required clear findings before subjecting local business to paramount Federal regulation, *Yonkers v. United States*, 320 U. S. 685, and cases therein cited. It has insisted upon 'suitable regard to the principle that whenever the Federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the Federal power must clearly appear.' Ibid.; *Florida v. United States*, 282 U. S. 194, 211-212; cf. *Phelps Dodge Corp. v. Labor Board*, 311 U. S. 177, 196-197, 8 LRRM 439; *Securities & Exch. Commission v. Chenery Corp.*, 318 U. S. 80, 92-95."

The findings of fact entered by the Hearing Examiner and approved by the Board in the instant case not only are not "clear findings" exhibiting "suitable regard" to the principles stated above, they are obviously not factual in nature at all. They are conclusions of law repetitive of the legal grounds for jurisdiction established by the statute and by the cases interpreting it. The absence of actual findings of

fact is explained by the Hearing Examiner's previous determination, as expressed at the hearing, that the satisfaction of the quantitative criteria set by the Board is sufficient to establish jurisdiction. Thus, instead of using the cautious approach on a case-by-case basis prescribed by the *Consolidated Edison* and *Polish Alliance* cases, the Board and its Hearing Examiner determined the jurisdictional issue in the present case on the basis of arbitrary standards, having nothing to do with the existence of jurisdiction in the particular case, applied in a Procrustean manner across the board.

2. The decision of the Court of Appeals supporting the proceedings before the National Labor Relations Board is in direct conflict with recent decisions of the Courts of Appeal for the First and Second Circuits, *N.L.R.B. v. Benevento, 297 F. 2d 873 (1st Cir. 1961); N.L.R.B. v. Reliance Fuel Oil Corp., 297 F. 2d 94 (2d Cir. 1961).*

The opinion of the Board in the instant case makes the determination of jurisdiction *solely* by means of application of the Board's internal jurisdictional standards as expressed in *Carolina Supplies and Cement Company, 122 N.L.R.B. 88* and in *Siemons Mailing Service, 122 N.L.R.B. 81, 85.* The Court of Appeals did not quarrel with the patently erroneous basis of the Board's assertion of jurisdiction. Instead it proposed to cure the failure of the Board to make necessary findings of fact on the jurisdictional issue by its holding that the record establishes jurisdiction as a matter of law.

The case of *N.L.R.B. v. Reliance Fuel Oil Corp., 297 F. 2d 94 (2d Cir. 1961)*, involved alleged unfair labor practices by

a concern engaged in a sale of fuel oil for heating purposes and in servicing oil burners and boilers. The findings of fact on the jurisdictional issue, characterized as "quite meager" by the Court of Appeals, were as follows:

> "The respondent is a New York corporation, with its principal office and place of business in Massapequa, Long Island, New York. It is engaged in the business of selling fuel oil for heating purposes, and servicing oil burners and boilers. All its customers are home owners located in the State of New York. During the fiscal year ended June 30, 1959, the Respondent's gross sales exceeded $500,000. During the calendar year 1959 the Respondent purchased from Gulf Oil Corporation, herein called Gulf, fuel oil and related products valued at more than $500,000. Most of the product delivered to the Respondent is refined outside the State of New York and delivered into Gulf's storage tanks at New York, New York. It is then transferred to Gulf's stationary storage tanks at Oceanside, Long Island, New York, without segregation according to customers. The Respondent's trucks load oil from Gulf's Oceanside tanks, and from there deliver it either directly to the Respondent's customers, or to the Respondent's tanks at Massapequa, from which it is later drawn and delivered to customers. The Respondent also obtains some fuel oil by exchange with other fuel oil companies on Long Island. This operates as follows: the Respondent draws a certain amount of oil from the other firm's tanks; conversely the other firm draws the same amount of oil from the Respondent's tanks. It is a barter operation, without the payment of money. The Respondent has on occasions obtained truck parts directly from outside the State of New York. In 1959, these purchases totaled 'a couple of hundred dollars at the most.' Other than this, the Respondent made no purchases of any kind directly from outside the State.
>
> "Gulf is engaged in the nonretail and retail sale of fuel oils and related products. It operates in New York

> and other States. Its gross sales and operating revenues in 1959, including consumer excise taxes, amounted to in excess of $3,170,000,000. The Respondent and the Party to the Contract concede, and I find, that at all material times Gulf was engaged in commerce within the meaning of Section 2(6) and (7) of the Act."

The Court refrained from enforcing the order of the N.L.R.B. on the basis of such findings and remanded to the Board with instructions to "take further evidence and make further findings on the manner in which a labor dispute at Reliance affects or tends to affect commerce." The findings of fact in the *Reliance* case were voluminous when compared with the so-called fact findings in the instant case, see page 5, supra.

The case of *N.L.R.B. v. Benevento, 297 F. 2d 873 (1st Cir. 1961)*, is in the most direct possible conflict with the instant case. There, as in the present case, the Hearing Examiner and the Board rested its assertion of jurisdiction on stipulations as to the volume of business done by the employer. In the *Benevento* case, the Hearing Examiner's findings on the jurisdictional issue, which was based solely on an admitted allegation in the General Counsel's amended complaint, was *(297 F. 2d 874)*:

> "During the calendar year preceding the issuance of the complaint, respondent sold products valued in excess of $50,000 to Red-E-Mix Co. of Reading, Pennsylvania, which company during the same calendar year purchased and received, from sources outside the Commonwealth of Massachusetts, products valued in excess of $50,000."

The Court held that such findings or stipulations, although sufficient to show that the Board's internal jurisdictional

standards had been satisfied, were insufficient to show that the alleged practices affected commerce. In that connection, the Court stated *(297 F. 2d 875, 876)*:

> "The Board's jurisdiction, therefore, is not to be decided by the application of a formula, as in *Siemons Mailing Service* 122 N.L.R.B. 81, 85 (1958), on which the Board relied in the case at bar, wherein the Board said that it 'has concluded that it will effectuate the policies of the Act if jurisdiction is asserted over all non-retail enterprises which have an outflow or inflow across state lines of at least $50,000, whether such outflow or inflow be regarded as direct or indirect.' On the contrary, the impact, if any, of a purely intrastate activity upon interstate commerce must be determined *by the Board* as a matter of fact in each case as it arises. * * *
>
> "Clear findings of fact based upon legally sufficient evidence must be made *by the Board* to support its assertion of jurisdiction. *N.L.R.B. v. Reliance Fuel Oil Corp.*, Docket No. 26806, 2d Cir. November 13, 1961." (Emphasis added.)

Manifestly, both the *Reliance* case and the *Benevento* case repudiate the assertion of jurisdiction solely on evidence showing compliance or satisfaction with the Board's internal jurisdictional standards, without the making of adequate additional findings of fact by the Board as to the effect on commerce of the activities involved. This practice, however, was allowed by the Court of Appeals in the instant case. In addition, both the *Benevento* case and the *Reliance* case clearly place on the Board the burden of making jurisdictional findings and do not allow the Court of Appeals to cure the jurisdictional defect created by the Board's failure to make adequate findings because of its mistaken understanding of the basis of its jurisdiction.

CONCLUSION

If the National Labor Relations Board is allowed to persist in the practice followed in the present case, the jurisdictional test prescribed by the statute will be rendered meaningless. In its place, the Board will be allowed to substitute quantitative standards which have the administrative allure of precision in application, but which bear no relation in the individual case to the ultimate jurisdictional issue. In addition, because Congress has allowed the Board in the statute the full range of the limitations set by the Constitution within which to assert its jurisdiction, to the extent that the Board asserts its jurisdiction over cases not comprehended by the statute it thereby circumvents its Constitutional limitations. For these reasons, this Court should grant the petition and establish, for the enlightenment of the Board and for the benefit of labor and management, the manner in which the jurisdiction of the Board under 29 U.S.C. § 160(a) shall be determined.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Counsel for Petitioner.
W. D. WHITE,
JAMES L. TRUITT,
TURNER, WHITE, ATWOOD,
MEER & FRANCIS,
1900 Mercantile Dallas
Building,
Dallas 1, Texas,
Attorneys for Petitioner.

AFFIDAVIT OF SERVICE

STATE OF TEXAS
COUNTY OF DALLAS

I, W. D. WHITE, counsel for Petitioners, do hereby certify that service of four copies of the foregoing Petition for Writ of Certiorari has been made on Respondent by mail in accordance with Rule 33 of the Rules of this Court.

Dated this day of September, 1962.

W. D. WHITE,
Attorney for Petitioners.

APPENDIX A

131 NLRB No. 105 D-2186

Dallas, Texas

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CITY TRANSPORTATION COMPANY and C. O. WHORTON, An Individual	Case No. 16-CA-1385-1
and C. B. SMITH, An Individual	Case No. 16-CA-1385-2
and H. C. JORDAN, An Individual	Case No. 16-CA-1385-3
and S. W. SLAKEY, An Individual	Case No. 16-CA-1385-4
and E. C. SLAKEY, An Individual	Case No. 16-CA-1385-5
and M. L. WILSON, An Individual	Case No. 16-CA-1385-6
and JOHN T. SMITH, An Individual	Case No. 16-CA-1385-7

DECISION AND ORDER

On January 11, 1961, Trial Examiner John H. Dorsey issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in this case and hereby adopts the findings, conclusions and recommendations of the Trial Examiner.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, City Transportation Company, Dallas, Texas, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise penalizing or disciplining any of its employees because they have engaged in concerted activities for the purpose of securing a change in terms and conditions of employment or for other mutual aid or protection;

(b) Keeping under surveillance the meeting place, meetings, and concerted activities of its employees engaged in for the purpose of collective bargaining or other mutual aid or protection; or

(c) In any other manner interfering with, restraining or coercing their employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in any other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Offer C. O. Whorton, C. B. Smith, H. C. Jordan, S. W. Slakey, E. C. Slakey, M. L. Wilson, and John T. Smith immediate and full reinstatement as taxicab drivers, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of earnings (including tips) each of them may have suffered by reason of Respondent's unfair labor practices in the manner set forth in the section of the Intermediate Report entitled "The Remedy", and in accordance with the formula of Board policy set out in *F. W. Woolworth Company*, 90 NLRB 289;

(b) Preserve and, upon request, make available to the National Labor Relations Board or its agents, for examination and copying all records necessary for the determination of the amount of backpay due under the terms of this Order;

(c) Post at its Akard Street and Oak Cliff, Dallas, Texas, garages, copies of the notice attached hereto marked "Ap-

[1] In the event that this Order is enforced by a decree of the United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words, "A DECISION OF THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER"

pendix".[1] Copies of the notice, to be furnished by the Regional Director for the Sixteenth Region shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt thereof, in conspicuous places including all places where notices to employees are customarily posted, and maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material;

(d) Notify the Regional Director for the Sixteenth Region, in writing, within ten (10) days from the date of this Order what steps the Respondent has taken to comply therewith.

Dated, Washington, D. C. May 26, 1961.

Frank W. McCulloch, Chairman

Philip Ray Rodgers, Member

John H. Fanning, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT discharge or otherwise penalize or discipline any of our employees because they have engaged in concerted activities for the purpose of securing a change in terms and conditions of employment or for other mutual aid or protection;

WE WILL NOT keep under surveillance the meeting place, meetings, and concerted activities of our employees engaged in for the purpose of collective bargaining or other mutual aid or protection;

WE WILL NOT in any other manner interfere with, restrain or coerce employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL offer C. O. Whorton, C. B. Smith, H. C. Jordan, S. W. Slakey, E. C. Slakey, M. L. Wilson, and John T. Smith immediate and full reinstatement to their former position, as taxicab drivers, without prejudice to their seniority or other rights and privileges,

and make each of them whole for any loss of pay (including tips) each may have suffered by reason of the discrimination against them.

CITY TRANSPORTATION COMPANY

(Employer)

Dated ..... By .....

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19138

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CITY TRANSPORTATION COMPANY,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board sitting at Washington, D. C.

(May 17, 1962)

Before HUTCHESON, RIVES and BELL, Circuit Judges.

PER CURIAM: This is a petition to enforce Board orders in a case in which the Board has found violations of Sec. 8(a)(1) in the action of respondent in discriminatorily discharging certain employees and in keeping a union organization meeting under surveillance. Respondent is a franchised taxicab company in the City of Dallas, which, among other activities, is the only taxicab company serving Love Field, Dallas Municipal Airport.

Respondent vigorously resists the petition on the ground (1) that the record fails to show that the Board had jurisdiction over the controversy, and (2) that if it had jurisdiction, the record as a whole does not support the findings of the Board and its orders requiring respondent to cease and desist from the forbidden practices and to take affirmative action to remedy the discriminations.

Respondent's attack on jurisdiction seems to be centered more on deficiencies in the form of the findings of Examiner and Board on this point than on the absence of facts[1] showing jurisdiction.

We think it clear that the jurisdictional position of respondent is not well taken, indeed that the record shows as matter of law that there was jurisdiction. *N.L.R.B. v. Fort Worth Transit Co.*, 187 F. (2) 792 (5 Cir.); *NLRB v. El Paso-Ysleta Bus Line, Inc.*, 190 F (2) 261 (5 Cir.).

On the question of discriminatory practices, we think the record overwhelmingly supports the Board's findings and orders. Of course, the respondent is correct in its legal

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[1]It was stipulated by the parties:

(1) Gross volume of business for the preceding year exceeded $2,500,000 from operating 380 cabs and 34 limousines.

(2) During the same period Respondent purchased:
   (a) $200,000 of replacement taxicabs from local automobile dealers;
   (b) Automobile parts of $25,000 from a local distributor who in turn had received same from outside the State of Texas.

(3) The limousines were used in parades, funerals and special occasions or hired by individuals, but primarily were operated for the purpose of transporting passengers between Dallas Love Field Airport and the downtown area, and the gross revenue from limousines during the preceding year exceeded $100,000.

(4) Love Field is a municipal airport out of which American, Braniff and Delta operate airplanes which transport passengers to and from Love Field and points outside Texas as well as to all points within the State of Texas having regular scheduled passenger service.

position that it is settled law that if the evidence shows employees are discharged for cause, the Board may not order their reinstatement. Not only are the cases so holding legion, but the statute expressly so provides.

When it comes, however, to the facts, respondent is not so well situated, The timing of the discharges, as well as the frivolous nature of most of the grounds asserted as reasons for discharge, clearly and fully supports the Board's conclusion. Indeed, we think that no other conclusion would be warranted than that the discharges were motivated by a desire to crush and suppress the movement by the employees then actively under way to obtain relief from what they regarded as intolerable working conditions.

Nor is there any more of substance in respondent's attack upon the finding of surveillance on the ground that those conducting the surveillance were not supervisors. This is so because if surveillance is conducted by the employer for the purpose of suppressing or discouraging union activity, it is not material whether the person conducting it for the employer is or is not technically a supervisor. It is sufficient to show that there was surveillance and that it was done by persons acting for and on behalf of the employer, and we think that beyond question the Board's findings of unlawful interference by surveillance is well supported on the record. *NLRB v. J. H. Rutter-Rex Co.*, (5 Cir.), 229 F (2) 816; *NLRB v. Sunnyland Packing Co.*, (5 Cir.), 211 F (2)

923; *NLRB v. Armstrong Tire & Rubber Co.*, (5th Cir.), 228 F. (2) 159; *NLRB v. East Texas Steel Castings Co., Inc.*, (5th Cir.), 211 F. (2) 813.

The order is

ENFORCED.

APPENDIX C

FILED
19th day of June, 1962
GILBERT F. GANUCHEAU
Deputy Clerk of the United States Court of Appeals

[389]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19138

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CITY TRANSPORTATION COMPANY,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board sitting at Washington, D. C.

(June 19 , 1962)

On Petition for Rehearing

Before HUTCHESON, RIVES and BELL, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and it is hereby DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19138

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

CITY TRANSPORTATION COMPANY,
Respondent.

DECREE

Before: Hutcheson, Rives, and Bell, Circuit Judges.

By the Court:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on May 26, 1961. The Court heard argument of respective counsel on April 10, 1962, and has considered the briefs and transcript of record filed in this cause. On May 17, 1962, the Court being fully advised in the Premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged, and decreed by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that the said order of the National Labor Relations Board in

said proceeding be enforced and that Respondent, City Transportation Company, its officers, agents, successors and assigns abide by and perform the direction of the Board in said order contained.

ENTERED: July 13, 1962

(ORIGINAL FILED—JULY 13, 1962)

APPENDIX E

29 U.S.C. § 160(a):

"§ 160. Prevention of unfair labor practices—

(a) Power of Board generally.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territory statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith."

SUPREME COURT, U. S.

No. 338

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In the Supreme Court of the United States

OCTOBER TERM, 1962

CITY TRANSPORTATION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
Department of Justice, Washington 25, D. C.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MORTON P. GLENN,
Assistant General Counsel,

DAVID P. FINDLING,
Attorney,
National Labor Relations Board,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 433

CITY TRANSPORTATION COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The Board's Decision and Order (R. 50-68, 84-89)[1] are reported at 131 NLRB 814. The opinion of the court of appeals (Pet. 21-24) is not yet officially reported.

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[1] "R." refers to matter printed in Volume I, Transcript of Record, pursuant to Rule 38 of the Court of Appeals for the Fifth Circuit. References designated "B.A." are to the Board's appendix to its brief in the court below; those designated "R.A." are to the appendix to petitioner's brief.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1962 (Pet. 21-24) and a petition for rehearing was denied on June 19, 1962 (Pet. 25). The petition for certiorari was filed on September 14, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly asserted jurisdiction over a taxicab company which derived a substantial part of its revenue from the regular transport of passengers to and from a municipal airport serving planes engaged in both interstate and intrastate travel.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

> Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. * * *
>
> * * * * *
>
> Sec. 2. When used in this Act—
>
> * * * * *
>
> (6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the

United States and any State or other territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

STATEMENT

A. *The Board's Decision and Order*—The Board found that petitioner violated Section 8(a)(1) of the Act by discharging seven named employees because they participated in protected concerted activities (R. 56-64, 84-85), and by engaging in surveillance of its employees' concerted activities (R. 53-55, 63-64, 84-85). The Board ordered petitioner to cease and desist from the unfair labor practices found, and to take appropriate affirmative action to undo the effects of its illegal conduct (R. 85-89). The sole question here relates to the propriety of the Board's conclusion that it had jurisdiction over petitioner's operations. The factual basis for this conclusion is a stipulation entered into by the parties at the hearing before the Trial Examiner, which, in relevant part, stated that (R.A. 4-6): Petitioner Company had an annual gross volume of business of $2,500,000, derived from operating 380 cabs and 34

limousines; the limousines, whose revenue exceeded $100,000, were used principally to transport passengers between Dallas Love Field Airport and downtown Dallas; Love Field is a municipal airport serving airlines which have regularly scheduled flights to points outside of, as well as within, the State of Texas.[2]

On the basis of these facts, the Trial Examiner concluded that petitioner was "engaged in commerce as defined in Section 2(6) and (7) of the Act," and that it had committed "unfair labor practices affecting commerce within the meaning of" those Sections (R. 64, 65). The Trial Examiner further found that petitioner's operations satisfied the Board's discretionary standards for the exercise of its legal jurisdiction (R. 52).[3] The Board, after considering "the entire record," adopted the Examiner's findings and conclusions (R. 85).

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[2] The stipulation also recited that petitioner purchased, during the preceding year, about $25,000 worth of automobile parts, which originally came from out-of-state.

[3] The Trial Examiner cited two Board decisions: (1) *Carolina Supplies and Cement Co.*, 122 NLRB 88, 89, where the Board announced that it would "assert jurisdiction over all retail enterprises which fall within its statutory jurisdiction and *which do a gross volume of business of at least $500,000 per annum*," and added that the term "'retail enterprises' shall be deemed to include taxicab companies" (*Id.* at 89, n. 5); (2) *Jat Transportation Corp.*, 128 NLRB 780, 782, where the Board specifically applied the *Carolina Supplies* standard to a taxicab operation in New York City, after first finding that legal jurisdiction existed by virtue of the fact that the companies utilized substantial quantities of supplies and materials which came from out-of-state.

B. *The Decision of the Court of Appeals*—The court of appeals held that "the record overwhelmingly supports the Board's findings and orders" (Pet. 22). Respecting petitioner's attack on the Board's jurisdiction, the court, summarizing the factual stipulation of the parties, stated (Pet. 22):

> We think it clear that the jurisdictional position of the [Company] is not well taken, indeed that the record shows as a matter of law that there was jurisdiction. *N.L.R.B.* v. *Fort Worth Transit Co.*, 187 F. 2d 792 (5 Cir.); *N.L.R.B.* v. *El Paso-Ysleta Bus Line, Inc.*, 190 F. 2d 261 (5 Cir.).

ARGUMENT

1. Petitioner does not deny that its regular transport of passengers to and from the Dallas municipal airport is a sufficient link with interstate commerce to bring its operations within the Board's legal jurisdiction.[4] Its sole contention (Pet. 7-8) is that Board jurisdiction is defeated because the Board did not rely, or make findings based, on that factor, but instead predicated jurisdiction simply on petitioner's gross volume of business, which, by itself, is inadequate to establish that its operations affected

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[4] See *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197; *Superior Court of Washington for King County* v. *Washington ex rel Yellow Cab Service, Inc.*, 361 U.S. 373; *National Labor Relations Board* v. *Fort Worth Transit Co.*, 187 F. 2d 792 (C.A. 5); *National Labor Relations Board* v. *El Paso-Ysleta Bus Line*, 190 F. 2d 261 (C.A. 5); *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 53 (C.A. 4).

commerce within the meaning of the Act. As the court below correctly concluded, this contention is insubstantial.

Petitioner fails to distinguish between the requirements for establishing the Board's *legal* jurisdiction and the Board's *discretionary* standards for the exercise of its legal jurisdiction. To be sure, the only cases cited by the Trial Examiner were *Carolina Supplies*, 122 NLRB 88, and *Jat Transportation Corp.*, 128 NLRB 780, which apply a gross volume test (n. 3, p. 4, *supra*). But this was for the purpose of determining whether the Board's discretionary standards were met. It was apparent that the requirements for legal jurisdiction had already been satisfied, for the stipulation of the parties indicated that petitioner's limousines were substantially engaged in the business of regularly transporting passengers to and from the Dallas airport, which served interstate and connecting intrastate flights.[5] In any event, the Examiner did make a specific finding that petitioner's unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act; and the

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[5] See *Guss* v. *Utah Labor Relations Board*, 353 U.S. 1, 3-4.

[6] The Board has recognized that, where the criteria utilized in its discretionary standards are not, by themselves, sufficient to establish that a business affects commerce within the meaning of the Act, there must be facts in the record to demonstrate legal jurisdiction as well as compliance with the discretionary standards. See *International Longshoremen & Warehousemen's Union (Catalina Island Sightseeing Lines)*, 121 NLRB 813, 814-815; *Carolina Supplies*, n. 3, p. 4, *supra*.

Board, in affirming the Trial Examiner, did so on the basis of the entire record (*supra*, p. 4).

2. Nor is the decision of the court below in conflict with *National Labor Relations Board* v. *Benevento*, 297 F. 2d 873 (C.A. 1), or *National Labor Relations Board* v. *Reliance Fuel Oil Corp.*, 297 F. 2d 94 (C.A. 2), cetriorari granted, 369 U.S. 883 (Pet. 8-11). In those cases, the connection between the business and interstate commerce was not as direct as here. In *Benevento* jurisdiction was asserted over a local sand and gravel company whose only tie with interstate commerce was that it sold materials to another company within the state, which, in turn, mixed them with materials obtained from out-of-state. *Reliance* involved a local fuel oil dealer who obtained supplies which originated out-of-state. Here, on the other hand, petitioner performs a service which is an essential part of the flow of interstate traffic, transportation and commerce. Thus, although we believe that a sufficient impact on commerce was shown in *Benevento* and *Reliance* to establish Board jurisdiction, it is clear that they are distinguishable from the present situation.

Indeed, in *Benevento*, the court's opinion expressly distinguishes those enterprises which, like petitioner's, are "links in a chain of interstate transactions and [where] obviously a break in the link would break the chain." 297 F. 2d at 875.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

GARY S. GREEN,
Attorney,

National Labor Relations Board.

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